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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY RAY SHANEE MALDONADO,

Defendant and Appellant.

A125916

(Sonoma County
Super. Ct. No. SCR33578)

Defendant Billy Ray Shanee Maldonado was convicted of burglary, unlawful loitering and resisting arrest. The trial court sentenced him to prison and imposed a \$10,000 restitution fine. Defendant appealed from that judgment and this court affirmed. Four years later, defendant filed from prison a motion to modify the restitution order, which the trial court denied. Defendant now appeals from that order. Defendant's attorney has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requesting our independent review of the record. Defendant was informed of his right to file a supplemental brief, but has not done so. We find no arguable issue and shall affirm.

BACKGROUND

In 2004, defendant was convicted by a jury of burglary of an inhabited dwelling house (Pen.Code,¹ §§ 459, 460, subd. (a)), unlawful loitering (§ 647, subd. (h)), and resisting an officer (§ 148, subd. (a)(1)). The trial court found that defendant had four prior strikes (§ 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)). The court denied a request to strike

¹ Further statutory references are to the Penal Code.

prior strikes and sentenced defendant to a term of 25 years to life plus seven years for the enhancements. The trial court imposed a \$10,000 restitution fine pursuant to section 1202.4. On appeal defendant challenged various rulings by the trial court, but did not challenge the imposition of the fine. In an unpublished opinion, this court affirmed the judgment. (*People v. Maldonado* (July 19, 2005, A106098) [nonpub. opn.].)

On July 6, 2009, the trial court received but did not file a document from defendant prepared in propria persona, entitled “Motion for modification of restitution pursuant to Penal Code section[s] 1202.4 & 2085.5.” The trial court summarily denied the motion and defendant timely appealed.

DISCUSSION

The motion argued that the “the trial court improperly imposed a \$10,000 restitution fine based upon the apparent erroneous assumption that he could pay that fine out of his future wages while incarcerated.”

Section 1202.4 provides in relevant part: “(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony . . . [¶] . . . [¶] (c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) or one hundred-dollar (\$100) minimum.”

The trial court lacked jurisdiction to consider defendant’s motion to modify the restitution order. “ ‘[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citation.]’ [Citations.] There are few exceptions to the rule. [¶] Section 1170, subdivision (d), provides, in relevant part, that a

trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison. [Citations.] Section 1170, subdivision (d), does not authorize a defendant to file a motion to recall the sentence. [Citation.] [¶] A trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment. [Citations.] [¶] Also, an unauthorized sentence may be corrected at any time. [Citations.] ‘The unauthorized sentence exception is “a narrow exception” to the waiver doctrine that normally applies where the sentence “could not lawfully be imposed under any circumstance in the particular case,” for example, “where the court violates mandatory provisions governing the length of confinement.”’ [Citations.] The class of nonwaivable claims includes “obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.” ’ (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204-1205.)

In *Turrin*, the defendant sought to have a restitution fine reduced on the ground that he was unable to pay it. The court held that where the defendant’s motion was filed 10 months after he began serving his sentence, “the trial court had lost jurisdiction; none of the exceptions applies. The court did not recall the sentence on its own motion and had no statutory authority to do so since section 1170, subdivision (d), requires the trial court to act within 120 days. Defendant did not seek correction of clerical error but instead he claimed judicial error.” (*People v. Turrin, supra*, 176 Cal.App.4th at p. 1206.)

Likewise in this case, defendant alleged a judicial error and asserted that he is unable to pay the fine that was imposed. The trial court has long since lost jurisdiction to make such an inquiry. Even if the trial court had jurisdiction, this court could not reach the error. The fine did not exceed the authorized limit of \$10,000 and no objection was raised at the time of sentencing so that resolution of the question turns on a factual inquiry. Thus, defendant does not assert a nonwaivable legal error that may be addressed for the first time on appeal. (See *People v. Neal* (1993) 19 Cal.App.4th 1114, 1123 [“trial counsel’s failure to object to a fine which may only be imposed when a defendant has

‘the ability to pay’ it bars raising any issue in connection with the propriety of such an order on appeal”].)

There are no issues that require further briefing.

DISPOSITION

The order is affirmed.

Pollak, J.

We concur:

McGuiness, P. J.

Jenkins, J.